

2021

Classical Liberal Property and the Question of Institutional Choice

Thomas W. Merrill
Columbia Law School, tmerri@law.columbia.edu

Follow this and additional works at: https://scholarship.law.columbia.edu/faculty_scholarship



Part of the [Property Law and Real Estate Commons](#)

Recommended Citation

Thomas W. Merrill, *Classical Liberal Property and the Question of Institutional Choice*, 50(S2) J. LEGAL STUD. S9 (2021).

Available at: https://scholarship.law.columbia.edu/faculty_scholarship/3386

This Article is brought to you for free and open access by the Faculty Publications at Scholarship Archive. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of Scholarship Archive. For more information, please contact scholarshiparchive@law.columbia.edu, rwitt@law.columbia.edu.

Classical Liberal Property and the Question of Institutional Choice

Thomas W. Merrill

ABSTRACT

Richard Epstein's property scholarship tracks his classical liberal theory of government. The classical liberal would permit state intervention to overcome collective-action problems but not to engage in redistribution of wealth. With respect to private law, Epstein harbors no clear preference for either the legislature or the courts as a source of limits on owners' autonomy to overcome collective-action problems. With regard to public law, in contrast, Epstein would elevate the courts to a superior status relative to legislatures and would have courts enforce the classical liberal ideal as a matter of constitutional law. This article questions whether giving such power to courts makes sense, even on classical liberal assumptions.

1. INTRODUCTION

Richard Epstein was my teacher at the University of Chicago Law School and has greatly influenced my thinking about law, especially property law. In particular, his preference for simple rules (Epstein 1995) resonates very strongly with me. Clear lines or boundaries promote individual autonomy and private ordering. They also help keep government in check. Obviously, not every problem can be solved using clear rules laid down in advance. But *ex post* balancing tests are dependent on shifting judicial preferences and subject to self-serving manipulation by lawyers on behalf of private interests. So much of my work in various fields of law, property foremost of all, has been a search for simple rules or principles, following Epstein's example.

I am also sympathetic to the political vision reflected in what Epstein now calls "classical liberalism" (Epstein 2014, 2003). As I read him, classical liberalism is based on a conception of the proper role of gov-

THOMAS W. MERRILL is the Charles Evans Hughes Professor of Law at Columbia Law School. Many thanks to Richard Epstein and the participants at the conference honoring his work for their helpful suggestions.

[*Journal of Legal Studies*, vol. 50 (June 2021)]

© 2021 by The University of Chicago. All rights reserved. 0047-2530/2021/5002-0015\$10.00

ernment intermediate between the libertarian night watchman and modern progressivism. Government is not limited to enforcing contracts and property rights. It can also seek to overcome collective-action problems—things like transaction costs, externalities, and opportunism—that make it difficult for individuals to create public goods like roads or to adopt regimes designed to promote competition. At the same time, government should not be used as an instrument to require subsidies from one group to another. The general picture is that state coercion should be limited to measures that enhance the aggregate welfare but should not be used for purely redistributive ends.

My task here is to consider how Epstein's vision of classical liberalism plays out in the realm of property law, a subject to which he has devoted sustained thought and has had some notable influence. My general thesis is that Epstein's normative conception of what property law should look like is highly successful in accounting for certain kinds of constraints that make a pure libertarian conception of government insupportable—those that can be grouped together under the rubric of collective-action problems. But it is less successful in identifying the institution that should be called on to implement the qualifications these collective-action difficulties make necessary. In discussing certain issues in the private law of property, Epstein has recognized that legislated solutions are often superior to judge-made solutions. But when he turns to public law, Epstein has uniformly advocated a highly activist form of judicial review strongly constraining the political branches when they deviate from a classical liberal conception of the state. I am skeptical for various reasons that this expansive form of judicial review would work and argue that in public law as well as private law, property rights may be more effectively secured if the legislature is given more breathing room than Epstein is wont to give it. This is not to say that there is no role for the judiciary to play. But property rights and private ordering may be better served by a judiciary that enforces the primacy of state law in matters of property and adheres to legal rules that are settled, as opposed to a strategy of urging judges to stamp out all deviations from the classical liberal ideal.

2. THE PRIVATE LAW OF PROPERTY

In considering Epstein's very substantial contributions to the law of property, I divide the discussion between private law—the law that governs

conflicts between individuals over the control and use of particular resources—and public law—the law that governs the relationship between the individual and the state with respect to property. I begin with Epstein's contributions in the realm of private law. In keeping with my theme of comparative institutional analysis, I organize the discussion not by issue but by institution, starting with what Epstein says about legislation and then considering what he says about judge-made law.

2.1. The Role of the Legislature

Someone who is familiar only with Epstein's discussion of takings law might be surprised by his strong endorsement of certain forms of legislation dealing with private conflicts over property. One illustration is his enthusiasm for recording acts (Epstein 1982, pp. 1355–58). These are statutes that reverse the common-law rule of first in time, first in right, and provide, roughly speaking, first to publicly record, first in right. In all their forms, recording acts provide a strong incentive to record deeds, mortgages, easements, and other instruments affecting property rights. Recording provides constructive notice to the world of the existence of these rights and thus bars messy fights between those claiming first in time and those claiming as subsequent good-faith purchasers.

Epstein's enthusiasm for recording acts is justified on several grounds. One is that they make property rights more secure and thus enhance the value of all property. A second is that these acts operate more or less mechanically, with little need for intervention by courts. A third is that recording acts, with their capacity to provide notice to the world (at least to those who search), make possible much greater heterogeneity in the creation of partial interests in property, such as leases and liens. Recording acts thus impose a small administrative burden on property owners but in return allow a great expansion of freedom to share property with others, for example, by using their property as collateral for loans.

Epstein is also a strong supporter of statutes of limitation on the recovery of interests in property and the associated doctrine of adverse possession (Epstein 1986, pp. 674–80). He starts with an assumption that property rights should be assigned to the first possessor of any unclaimed asset and that such first possession should translate into absolute ownership for a potentially infinite time. Nevertheless, Epstein readily endorses the idea that if an owner fails to assert his rights before the statute of limitations runs, he should lose his rights to a later possessor.

Epstein's justification for this legislated exception to the prima facie allocation of property rights is similar to the one he offers for recording acts. As time passes, ownership and possession can diverge, making proof of original ownership increasingly costly and prone to error. Allowing original owners to pursue claims based on ancient wrongs would therefore be unsettling to the reliance interests of current possessors. The burden on owners to prevent such a shift in entitlement is relatively small: they need only periodically inspect their property and assert claims against persons found to be in possession without permission before the time designated by the legislature lapses. And because the statutes eliminate costly and error-prone litigation and wipe out stale claims that complicate determinations of title, they increase the value of all property.

Perhaps the most striking example of Epstein's endorsement of legislative regulation of property concerns water rights. With respect to navigable waters, the law starts with a presumption of access open to all. But Epstein recognizes that as demand for access rises, a collective-action problem emerges that individuals cannot resolve by themselves. "As traffic gets heavier, it may well be necessary to establish rules of the road, to mark safe channels, to dredge or widen navigable passages, to remove obstacles from the river, and to control pollution from all sources on land and within the waterway" (Epstein 2015, p. 2357). Navigable water thus "transforms itself from a *res commune* to one that has strong elements of government ownership and control" (p. 2357).

Similarly, with respect to consumptive uses of water, Epstein recognizes that the appropriation systems that emerged in arid western states cannot work without active government regulation. The complexities presented by variations in the flow of water and the recognition of hierarchies of uses mean that the rights of rival claimants "can only be determined under some comprehensive system of direct state regulation, which in turn requires the creation of complex administrative water boards and commissions to police the hierarchies and rights structure so created" (Epstein 2015, p. 2360). The transfer of rights so recognized is also problematic, given the external effects on downstream claimants of any diversion from the watershed. "In this context, there is no sensible regime of free alienability, so that extensive administrative oversight is often required to determine whether to allow—and if so, on what conditions—certain kinds of property transfers, and only after the receipt and interpretation of expert evidence on all disputed points" (p. 2361). At least with respect to water, Epstein endorses a robust version of the administrative state.

2.2. The Role of the Courts

In contrast to his enthusiasm for at least some types of legislated modifications of common-law property rights, Epstein has been highly critical of much judge-made doctrine that restricts the scope and disposition of property rights. Not uniformly critical, of course. His early articles endorse strict-liability versions of trespass and conversion, and he has never waived from this (Epstein 1975; for a recent restatement, see Epstein 2010). But when discussing other judge-made doctrines, even those designed to reduce holdout problems and other types of transaction costs, he has tended to be highly critical.

Perhaps the most important critique of judicial doctrine, in terms of both its role in the evolution of Epstein's thought and its intersection with the work of Ronald Coase, is his paper on nuisance law (Epstein 1979). There he sets forth a normative conception of nuisance law, drawing on a foundation of corrective-justice principles as modified by what he calls utilitarian constraints.

Others have wondered whether Epstein's mixture of corrective justice and utilitarianism is intellectually justifiable (for an early example of competing views, see Round Table Discussion 1986). I focus on another feature of the article: the doctrine he delineates is much more constraining of judicial discretion than the current law of nuisance. The corrective-justice principle yields what Epstein calls the invasion requirement. Like trespass, nuisance liability arises (he asserts) only when something crosses the boundary and enters the plaintiff's land. The invasive material subject to nuisance law typically consists of "fumes, noises, smells, smoke, gases, heat, [or] vibrations" (Epstein 1979, p. 53). Importantly, however, if there is no invasion, there is no nuisance. Thus, it is not a nuisance to store junked cars in a yard, erect unsightly billboards, build a structure that casts a shadow on a neighbor's solar collector, or run around naked on one's land, even if these activities diminish the use and enjoyment of neighboring property.

Part of Epstein's justification for the invasion requirement is conceptual. It is necessary to establish an initial delineation of rights before we can ask whether A is liable to B or B to A in cases in incompatible land uses (Epstein 1979, p. 61). But Epstein also rests the case for the invasion requirement on libertarian principles. The invasion requirement protects "one of the essential functions of private property, that of specifying for each person a domain of action in which he is not accountable to the

whims or demands of any other group of individuals” (p. 63). If mere “cognitive dislike of certain activities by others” is sufficient to permit an action, then there is nothing to prevent nuisance law from becoming an instrument of “tyranny by the majority” (p. 63).

Having established a baseline grounded in the invasion principle, Epstein then introduces a series of utilitarian constraints. The most important he calls the “live and let live” rule. This is the idea that if the harms at issue are reciprocal, in the sense that over time each landowner is likely to be both a source and a victim of the invasion in question, it is best simply to leave the harm unredressed.

A second utilitarian constraint Epstein calls the locality rule. This too rests on the idea of reciprocity. Here the idea is that reciprocity will be a function in significant part of the dominant use of land in the area in question. In a factory district, a higher level of smoke and noise will be acceptable on grounds of reciprocity relative to what would be permissible in a residential neighborhood.¹

Epstein justifies these utilitarian constraints on multiple grounds. They conserve on administrative costs in establishing liability, they reduce transaction costs in contracting for different outcomes, and they provide what he calls “implicit in kind compensation” for the plaintiff, thereby precluding “any systematic redistribution of wealth among all the interested parties” (Epstein 1979, p. 79).

Significantly, the utilitarian constraints, like the baseline invasion requirement, are rules, or at least are significantly rule-like. In combination, they yield a doctrinal formulation for resolving nuisance cases that offers far less room for judicial discretion than does the existing case law or the *Restatement of Torts*, which portrays nuisance liability as an unreasonable interference with the use and enjoyment of land, as determined by a balancing of costs to the plaintiff and benefits to the defendant (*Restatement [Second] of Torts*, vol. 4, secs. 821F, 822, 826).

Turning from nuisance law to restrictions on future uses of property imposed by owners, we again find that Epstein is no fan of the common law. Indeed, in this context Epstein wields a scythe cutting down virtually every judge-made doctrine that restricts the power of an owner to dictate how the property will be used in the future. He would abolish the Rule against Perpetuities and the rule against restraints on alienation, he strongly disapproves of the traditional law of waste, he would overrule

1. Epstein also discusses a third constraint—the rejection of liability based on extra-sensitive plaintiffs or land uses (Epstein 1979, pp. 90–94).

the touch and concern requirement for allowing covenants to run to successors in interest, and he would eliminate the doctrine of changed circumstances permitting judges to abrogate covenants found to be obsolete (Epstein 1982, pp. 1358–68; 1986, pp. 703–14).

The justification Epstein offers for this ruthless streamlining of the common law is that none of these doctrines address a genuine externality (Epstein 1985a). Take the rule against restraints on alienation. Epstein acknowledges that if a grantor imposes a restraint on alienation, this will greatly reduce the value of the property in the hands of the grantee, who now has an asset he cannot sell. But the grantor has every reason to be aware of this. For that reason, few grantors will attach restraints on alienation to gifts of property, because their dominant motivation is to enhance the well-being of the recipient. Indeed, a well-advised grantor will convey the property in trust, giving the trustee appropriate powers to make adjustments in light of unforeseen circumstances. In other words, the loss in value associated with any restraint on alienation is internalized by the owner who creates the restraint. There being no externality, there is no justification for a judicial doctrine limiting freedom to dispose of property as one likes (Epstein 1986, pp. 713–14).

I do not disagree with Epstein's characterization of what most grantors will do most of the time. The question is whether judge-made doctrines like the rule against restraints on alienation interfere only modestly with the aspirations of the large majority of owners who are well advised and fully competent while at the same time offering important protections against the actions of the minority who are poorly advised or suffer from diminished capacities. If restraints on alienation are permissible and can last forever, then the descendants who inherit property subject to such a restriction will have no way to renegotiate the grant with the original owner, who is long dead. Whether or not this is properly characterized as an externality, it is certainly an example of high transaction costs frustrating a beneficial exchange of rights. The rule, like the recording acts and adverse possession, imposes a limit on what owners can do with their property, but it is a fairly modest limit.² And it helps insure that property is always alienable, which greatly increases the benefits of the system of private property, to the advantage of all.

2. The common law in fact permits restraints on alienation of leases and is highly tolerant of restraints on alienation of life estates. The policy against restraints on alienation has most force in the context of absolute ownership, where the risks of changed circumstances and bilateral monopoly impediments to renegotiation are the greatest.

The main point I would make about Epstein's discussion of common-law rules limiting the freedom of owners to restrict the future use of property is that they show a consistent hostility to judge-made doctrines that limit dispositional freedom. As in the case of his discussion of nuisance law, Epstein's preference for simple rules shines through brightly. Such rules make it clear who is in charge of the property: the owner, not the state. As such, they enlarge the sphere of individual autonomy relative to state actors, whether they are the legislature or the courts. But there is no suggestion in Epstein's various discussions of the private law of property that he sees the legislature as uniquely threatening to owners' autonomy or regards the courts as being a preferred institution for adopting restrictions on owners' autonomy in the interest of overcoming administrative and transaction costs.

3. THE PUBLIC LAW OF PROPERTY

When we turn from private law to public law, this neutrality in matters of institutional choice disappears. Epstein has written extensively about various public law doctrines affecting property.³ Given the limits of space, I discuss only his most important intervention in this regard, which concerns the proper interpretation of the power of eminent domain (Epstein 1985b, 2008). And I again focus on the question of institutional choice.

The starting point for Epstein's consideration of public law is a premise I call the Lockean equation. The assumption is that the role of the state is to act as the collective agent for the individuals who make up the state. The state steps in where individuals cannot act, given prohibitive transaction costs (Epstein 2011a). But the government has no powers greater than those of the individuals it represents.

Given the Lockean equation, one might expect that the strong preference for bright-line rules that we find in Epstein's view of private law would carry over to public law. But this is only partially true.

To simplify, Epstein's conception of an ideal takings doctrine goes like this. Any state action that reduces one or more of the incidents of property is *prima facie* a taking. Thus, not only transfers of possession from the owner to the state but any and all regulations of use, enjoyment, or

3. I include here his writings on the contracts clause (Epstein 1984), the public trust doctrine (Epstein 1987), and procedural due process (Epstein 2014, pp. 314–36).

disposition of property must be justified against the claim that compensation is required for the reduction in the owner's autonomy. Epstein would thus shift the burden of persuasion from the individual to the state to offer a defense for not compensating the owner for any loss in the value of private property (Epstein 1985b, pp. 57–62, 93–104).

One defense available to the state is the police power. Epstein's Lockean equation yields a conception of police power that follows directly from his understanding of private law. Anything an individual can do by way of defense of his property is something the state can do for him. Thus, the state can prohibit trespasses and thefts. And it can regulate what would be nuisances under Epstein's conception of ideal nuisance law (Epstein 1985b, pp. 107–25). This yields a much more clear-cut conception of police power than the usual formulas that speak vaguely of laws promoting the public health, safety, and welfare.

Another defense available to the state is provided by the principle of implicit in-kind compensation. If the owner obtains offsetting benefits from a regulation, in the form of similar regulation being imposed on other property owners or otherwise, again no compensation is required (Epstein 1985b, pp. 195–215). Here, a subtle shift occurs in moving from private to public law. In the discussion of nuisance law, the idea of implicit in-kind compensation was introduced as a justification for relatively clear rules, like live and let live and the locality rule, qualifying the baseline invasion principle. Now implicit compensation becomes a freestanding defense to takings liability.

Once implicit in-kind compensation becomes a general defense, it loses its rule-like quality. The basic problem is uncertainty about the level of generality at which we consider whether the owner has obtained implicit compensation. In-kind compensation can be defined narrowly, as with offsetting benefits subtracted from just compensation in the case of partial takings of land by eminent domain. Or it can be defined more imprecisely, as when building height restrictions both burden and benefit every owner in a difficult-to-quantify way. The broadest conception was suggested by Justice Louis Brandeis, in the first modern regulatory takings case, who wrote of the implicit benefits "of living and doing business in a civilized community" (*Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 422 [1922] [dissenting opinion]). Absent some restrictive definition of what qualifies as implicit in-kind compensation, the defense loses its

rule-like quality and becomes a general standard that confers large discretion on judges in resolving regulatory takings claims.⁴

The problem runs deeper. When one combines the burden shifting to the state, with the conception of police power as limited to the rectification of invasions of private rights, with the defense of implicit in-kind compensation, what do you get? What you get is a conception of the takings clause as a judicially enforced prohibition on any government action that changes the preexisting distribution of wealth. In effect, Epstein has tasked the judiciary with enforcing a takings clause transformed into a general antiredistribution principle.

This is a very large and complicated task. One implication, which Epstein forthrightly acknowledges, is that all tax legislation is now subject to challenge under the takings clause (Epstein 1985b, pp. 283–305). Another implication, which he also acknowledges, is that entitlement programs like Social Security and Medicare should also be subject to challenge under the takings clause, insofar they are funded by taxes on income and property that are not proportionate to the value of the future benefits obtained (Epstein 1985b, pp. 306–29). Bowing to reality, Epstein would grandfather existing entitlement programs, but he would draw the line at future expansions (Epstein 1985b, pp. 324–29). A third implication, which he does not pursue, is that some method would have to be devised for recapturing windfall gains produced by government subsidies and purchasing decisions, although it is very unclear how the takings clause could be retrofitted to these ends (Kades 1999, pp. 1558–61).

Epstein has a well-developed argument in support of such a general antiredistribution norm: limiting the government to providing public goods that benefit all is more likely to lead to cooperation and compromise, since everyone gains, at least to some degree. Opening the door to explicitly redistributive measures gets you class conflict, partisan gridlock, and bitter animosity (Epstein 2008, pp. 28–34; Merrill 1986). The question is whether elevating this norm to a principle enforceable as a matter of unamendable constitutional law is an appropriate task for judges.

4. Epstein introduces three subordinate principles to be used in making the in-kind compensation analysis: whether the regulation deals with a collective-action problem, reveals a redistributive motive, or has a disproportionate impact on a small number of persons (Epstein 1985b, pp. 201–9). This helps narrow the range of inquiry somewhat but hardly moves the needle all the way from the standard side of the continuum to the rule side.

4. THE QUESTION OF INSTITUTIONAL CHOICE

The ultimate issue here, at least for me, is one of institutional choice. If certain qualifications of owners' autonomy are necessary given transaction cost barriers to collective action, which institution is most likely to implement those qualifications in a manner that does the least damage to the classical liberal ideal: the legislature or the courts?

There are several reasons to worry about giving the job to judges. One has to do with skepticism about any program of rule by elites. One of the powerful arguments in support of classical liberalism, with its vision of limited government and preference for competition, is the argument developed by Friedrich Hayek about the impossibility of managing complex institutions on a top-down basis, given the massive amount of information involved (Hayek 1945). Epstein would give final authority over tax and social welfare legislation to nine lawyers sitting on the Supreme Court (or five, since outcomes in takings cases tend to be closely divided). Supreme Court justices may be smarter than the average Joe, but they are not nearly smart enough to know how society should be structured from top to bottom.

Another reason is what Komesar (1994, pp. 142–49) calls the problem of scale. The judiciary is too puny an institution to impose its will on society in more than a small number of areas. The Supreme Court hears only about 75 cases a year, usually only one or two at most on the takings clause. Even if we consider all of the federal bench, the number of Article III judges is less than one-tenth of 1 percent of the number of employees in the executive branch.⁵ The judiciary cannot possibly keep up with all the issues tossed up by our dynamic society to which the government, in all its forms, inevitably responds. Judges must pick and choose. In one era, the judges pick railroad regulation; in another, they focus on race relations. Who is to say what will come next? My point is that courts will necessarily specialize in a select number of issues identified by the zeitgeist and lack the capacity to direct society more generally.

A third reason is Vermeule's (2006) insight about the problem of co-

5. As of 2017, there were 860 authorized Article III federal judgeships (not all filled) (see Administrative Office of the U.S. Courts, Authorized Judgeships: All Courts [<https://www.uscourts.gov/sites/default/files/allauth.pdf>]). The federal executive branch employed 2,079,000 persons in 2014, excluding military personnel and postal workers (see US Office of Personnel Management, Data, Analysis, and Documentation: Federal Employment Reports [<https://www.opm.gov/policy-data-oversight/data-analysis-documentation/federal-employment-reports/historical-tables/executive-branch-civilian-employment-since-1940/>]).

ordination. Judges make policy by deciding cases brought by motivated litigants; they have no control over what issues are presented to them. Moreover, they sit on panels composed of judges of diverse views appointed by different administrations. These panels proceed by majority vote. It is very difficult—nay, impossible—to enforce over time a consistent normative vision of the proper role of the state as the composition of the courts and the identity of the judges changes.

A fourth point is that judges, as highly educated products of American colleges and law schools, are likely to enforce values that appeal differentially to the milieu from which they emerge. Studies indicate that Supreme Court justices, for example, espouse policy preferences more consistent with those held by elites than by the median American voter (Baum and Devins 2010). And elites, at least those who teach in American law schools, overwhelmingly support the policy preferences of modern progressivism, not classical liberalism (see McGinnis, Schwartz, and Tisdell 2005). All of this suggests that shifting policy-making authority from democratic institutions to the judiciary, in the aggregate and over time, will move us further from classical liberalism.

Casual empiricism supports the proposition that judges are unlikely to take up the cause of enforcing the tenets of classical liberalism against the political branches. Since Epstein's book *Takings* was published in 1985, the Supreme Court has been continually controlled by a majority of justices appointed by Republican presidents. One can detect Epstein's influence in a renewed interest in the taking clause during this period and in some notable decisions such as *Lucas v. South Carolina Coastal Council* (505 U.S. 1003 [1992]).⁶ Yet Epstein has expressed disappointment with virtually all of the Court's major decisions, including *Lucas*, on the ground that they do not fully comport with his theory.⁷ If classical liberalism cannot take hold in the fertile judicial soil of the last 35 years, there is little prospect of it prevailing in less auspicious times.

6. Justice Antonin Scalia's opinion for the Court cited Epstein's work (*Lucas*, 505 U.S. 1015), and generally followed the line of argument set forth by Epstein in an amicus brief: that government regulation eliminating all economic value can be justified only if it tracks the common law of nuisance (Epstein 1992a).

7. Notwithstanding his success in *Lucas*, Epstein took to the law reviews, criticizing the decision for limiting the holding to regulations that cause a complete loss in economic value (Epstein 1993). For other expressions of disappointment with the Court, see Epstein (1992b, 2002, 2007, 2011b, 2016, 2017). Epstein has acknowledged that "there is little reason to think that the courts have adopted my positions in whole, or even in part" (Epstein 2006, p. 412). In defense of his efforts, Epstein has written that it is enough to "switch the climate of opinion even a little bit" about the proper scope of the takings clause (p. 412). The persistence of his attacks on the Court suggests that the real ambition has been larger.

A related point harkens back to Epstein's criticism of certain aspects of the judge-made law of property. The English judges who forged much of the common law, and their American descendants, were generally part of the propertied classes and as such were highly solicitous of the rights of private property. If they could not get it right (that is, if they failed to hew consistently to the view of property required by classical liberalism), what hope is there that modern judges will consistently embrace such a perspective?

Of course, simply because there are reasons to doubt that courts will embrace classical liberalism, it does not follow that legislatures will do better. I certainly would not want to defend the proposition that legislatures always act with respect to property in ways that would be approved by a classical liberal. It is all a matter of comparative analysis. Nevertheless, let me offer some reasons to think that, at least with respect to property rights, legislatures may not do all that badly from the perspective of someone attracted to the political vision of classical liberalism.

One consideration is that property rights are widely distributed in modern liberal societies like the United States. They of course are not equally distributed, as the progressives never tire of reminding us. But the vast majority has some property. And there is plenty of evidence that people are strongly attached to their property. The widespread outcry that followed the Supreme Court's decision in *Kelo v. City of New London* (545 U.S. 469 [2005]) suggests that the public is quite hostile to government interference with property rights (Berliner 2015, pp. 84–85). Today, practically any proposal to use eminent domain—for even the most conventional of purposes—is greeted by public protests and demands that the government “keep your hands off my property.”⁸ All of which suggests that legislatures will not adopt policies that systematically undermine property rights.

Another consideration is that legislatures often act in a pluralistic fashion, which tempers the ability of one interest or faction to exploit the property of another. The process is obviously imperfect, and everyone can cite examples of interest group capture of legislatures and administrative agencies. But the political system is inherently competitive. This means that it is open not only to those eager to enhance their property at the expense of others but also to those anxious to protect their property from those who would undermine it. The result is often a standoff and

8. A comprehensive survey of public opinion polling post-*Kelo* reports that from 40 to 60 percent of respondents disapproved of any exercise of eminent domain (Nadler, Diamond, and Patton 2008, p. 298).

eventually a compromise in which no group completely dominates the other. This too suggests that in the long run the legislative output will reflect a balance of interests consistent with the general support for property that is part of the America value system.⁹

A third consideration is that property law, at least in the United States, is largely state law. The states are not only closer to the wishes of the people, they are also in competition with each other for tax revenues and capital investment. Put another way, the states compete to provide a climate conducive to economic growth. Since economic growth in a capitalist system is dependent on secure property rights, state competition works to promote a climate generally favorable to property rights (Been 1991). And indeed, we find that state legislatures have enacted a variety of laws designed to protect private property from condemnation or excessive regulation, and state courts deploy a variety of state law doctrines to protect property owners from overly zealous local governments (Sterk 2004, pp. 257–70).

If I am right that legislatures are not likely to be the enemy of private property, at least not on any systematic basis, does this mean that the judiciary should retreat into meek deference to whatever the political system produces? Not at all.

The proper strategy here, I believe, is to encourage courts to maintain the greatest possible measure of fidelity to law. With respect to the Constitution, this means enforcing the provisions that are clear, and there are many that are reasonably clear, including the requirement to pay compensation for property obtained through forced exchanges.¹⁰ It also

9. Epstein's most persistent criticism has been directed at local zoning boards. But as Fischel (2001) persuasively argues, the behavior of zoning boards in most communities is consistent with the interests of local homeowners, who have undiversified wealth tied up in their homes. Zoning is thus an example of majoritarian bias, as manifested in not-in-my-backyard sentiments. Whether courts should intervene to protect developers against this majoritarian bias raises extremely complex questions about whether developers have sufficient ability—developers being a concentrated minority interest (see, for example, Olson 1965)—to protect themselves without any judicial assist beyond ordinary state court review of the zoning process.

10. The takings clause (U.S. Const. amend. V), which has been held to be incorporated against the states, provides, “nor shall private property be taken for public use without just compensation.” The clause is easily interpreted to mean that any forced exchange of private property by the state that would ordinarily require a purchase of rights must be accompanied by just compensation. Such forced exchanges would include acquisitions not just of fee-simple interests in land but also acquisitions of personal property, intellectual property, leases, and easements.

means enforcing interpretations that are settled. A number of open questions will always remain, but these should be decided in a way that is consistent with the body of law that is settled, with a preference for clear and even simple rules and principles going forward. Judges should take naturally to such a rule-of-law strategy, since it appeals to a large element of their professional identity and is the source of their prestige. A law-driven judiciary, I would contend, will also promote a flourishing system of private ordering, since private actors have great ingenuity about adjusting to rules if they are clearly expressed and consistently enforced. And a law-bound judiciary would work against government aggrandizement, both vis-à-vis the private sector and internally when one branch or level of government seeks to usurp the settled prerogatives of another.

5. CONCLUSION

Richard Epstein is concerned with articulating what the law of property would look like in a classical liberal world. Unlike a pure libertarian, Epstein offers a vision of property law that takes collective-action problems into account. He combines libertarian sympathies with realism about the prospects for private ordering. My point is simply that Epstein should also give more consideration to another set of concerns—about the relative capacity of different institutions to overcome collective-action problems in such a way as to preserve the values associated with classical liberalism. He should be a realist about the prospects for public ordering too.

I have argued that, at least with respect to property, there is little reason to think that judges will act in a coordinated fashion to enforce a program of classical liberalism against the political branches. The legislature will not consistently embrace classical liberalism either. But the question then becomes which institution, or combination of institutions, is the least worst from the perspective of the classical liberal ideal. I have argued that leaving property law to the states and urging the judiciary to stick to a rule-of-law strategy is the right combination. This, I believe, is the most plausible path to striking the right balance between the libertarian ideal and the incessant calls for greater state intervention in the name of redistribution.

REFERENCES

- Baum, Lawrence, and Neal Devins. 2010. Why the Supreme Court Cares about Elites, Not the American People. *Georgetown Law Journal* 98:1515–81.
- Been, Vicki. 1991. “Exit” as a Constraint on Land Use Exactions: Rethinking the Unconstitutional Conditions Doctrine. *Columbia Law Review* 91:473–545.
- Berliner, Dana. 2015. Looking Back Ten Years after *Kelo*. *Yale Law Journal Forum* 125:82–93.
- Epstein, Richard A. 1975. Intentional Harms. *Journal of Legal Studies* 4:391–442.
- . 1979. Nuisance Law: Corrective Justice and Its Utilitarian Constraints. *Journal of Legal Studies* 8:49–102.
- . 1982. Notice and Freedom of Contract in the Law of Servitudes. *Southern California Law Review* 55:1353–68.
- . 1984. Toward a Revitalization of the Contract Clause. *University of Chicago Law Review* 51:703–51.
- . 1985a. Why Restrain Alienation? *Columbia Law Review* 85:970–90.
- . 1985b. *Takings: Private Property and the Power of Eminent Domain*. Cambridge, MA: Harvard University Press.
- . 1986. Past and Future: The Temporal Dimension in the Law of Property. *Washington University Law Quarterly* 64:667–702.
- . 1987. The Public Trust Doctrine. *Cato Journal* 7:411–30.
- . 1992a. Ruminations on *Lucas v. South Carolina Coastal Council*: An Introduction to Amicus Curiae Brief. *Loyola of Los Angeles Law Review* 25:1225–58.
- . 1992b. *Yee v. City of Escondido*: The Supreme Court Strikes Out Again. *Loyola of Los Angeles Law Review* 26:3–22.
- . 1993. *Lucas v. South Carolina Coastal Council*: A Tangled Web of Expectations. *Stanford Law Review* 45:1369–92.
- . 1995. *Simple Rules for a Complex World*. Cambridge, MA: Harvard University Press.
- . 2002. The Ebbs and Flows in Takings Law: Reflections on the *Lake Tahoe* Case. *Cato Supreme Court Review* 2002:5–29.
- . 2003. *Skepticism and Freedom: A Modern Case for Classical Liberalism*. Chicago: University of Chicago Press.
- . 2006. Taking Stock of Takings: An Author’s Retrospective. *William and Mary Bill of Rights Journal* 15:407–20.
- . 2007. From Penn Central to Lingle: The Long Backwards Road. *John Marshall Law Review* 40:593–607.
- . 2008. *Supreme Neglect: How to Revive Constitutional Protection for Private Property*. New York: Oxford University Press.
- . 2010. Toward a General Theory of Tort Law: Strict Liability in Context. *Journal of Tort Law* 3:6–46.

- . 2011a. *Design for Liberty*. Cambridge, MA: Harvard University Press.
- . 2011b. Littoral Rights under the Takings Doctrine: The Clash between the *Ius Naturale* and *Stop the Beach Renourishment*. *Duke Journal of Constitutional Law and Public Policy* 6:37–74.
- . 2014. *The Classical Liberal Constitution*. Cambridge, MA: Harvard University Press.
- . 2015. How Spontaneous? How Regulated: The Evolution of Property Rights Systems. *Iowa Law Review* 100:2341–64.
- . 2016. The Unfinished Business of *Horne v. Department of Agriculture*. *New York University Journal of Law and Liberty* 10:734–76.
- . 2017. Disappointed Expectations: How the Supreme Court Failed to Clean Up Takings Law in *Murr v. Wisconsin*. *New York University Journal of Law and Liberty* 11:151–217.
- Fischel, William A. 2001. *The Homevoter Hypothesis: How Home Values Influence Local Government Taxation, School Finance, and Land-Use Policies*. Cambridge, MA: Harvard University Press.
- Hayek, Friedrich A. 1945. The Use of Knowledge in Society. *American Economic Review* 35:519–30.
- Kades, Eric. 1999. Windfalls. *Yale Law Journal* 108:1489–1568.
- Komesar, Neil K. 1994. *Imperfect Alternatives: Choosing Institutional Law, Economics and Public Policy*. Chicago: University of Chicago Press.
- McGinnis, John O., Matthew A. Schwarz, and Benjamin Tisdell. 2005. The Patterns and Implications of Political Contributions by Elite Law School Faculty. *Georgetown Law Journal* 93:1167–1220.
- Merrill, Thomas W. 1986. Rent Seeking and the Compensation Principle. *Northwestern University Law Review* 80:1561–90.
- Nadler, Janice, Shari Seidman Diamond, and Matthew M. Patton. 2008. Government Takings of Private Property Pp. 286–309 in *Public Opinion and Constitutional Controversy*, edited by Nathaniel Persily, Jack Citrin, and Patrick J. Egan. New York: Oxford University Press.
- Olson, Mancur. 1965. *The Logic of Collective Action*. Cambridge, MA: Harvard University Press.
- Round Table Discussion. 1986. Time, Property Rights, and the Common Law. *Washington University Law Quarterly* 64:793–865.
- Sterk, Stewart E. 2004. The Federalist Dimension of Regulatory Takings Jurisprudence. *Yale Law Journal* 114:203–71.
- Vermeule, Adrian. 2006. *Judging under Uncertainty*. Cambridge, MA: Harvard University Press.